IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.1738 OF 2004

Shivaji Ananda Pawar ...Applicant

vs.

Smt.Lata Ashwain Chheda & Ors. ...Respondents

Mr.D.S.Chandnani for the Applicant
Mr.Prakash Naik for Respondent Nos.1 and 2
Ms M.H.Mhatre,A.P.P. for State

CORAM: A.S.OKA,J.
DATE : AUGUST 18,2005

JUDGMENT:

1. Heard learned Counsel for the Petitioner and the learned Counsel for the Respondent No.1. The Petitioner is the original complainant. The Respondent Nos.1 and 2 are arraigned as Accused Nos.5 and 6 in the private complaint filed by the Petitioner and the Respondent Nos.4 to 7 are original accused No.1 to 4. The challenge in this application under Section 482 of the Code of Criminal Procedure, 1973 (thereinafter referred to as the said Code) is to the Judgment and Order dated 3rd March 2004 passed by the First Ad hoc Additional Sessions Judge,Raigad-Alibag. By the impugned order, the learned Additional Sessions Judge has quashed the order issuing process as against the respondent Nos.1 and 2 herein (original accused Nos.5 and 6).

2. The offences alleged against the accused in the private

complaint filed by the Petitioner are under Sections 192,206,207,403,406,410,420,423 read with Section 34 and 37 of the Indian Penal Code. On 15th March 2001, the Magistrate issued process on the complaint filed by the Petitioner. The process was ordered to be issued against all the accused including Respondents herein. On 8th February 2002, the Respondents made an application for recalling the order of process and for discharge. By order dated 17th April 2002, the learned Magistrate dismissed the said application. Being aggrieved by the order of the learned Magistrate, a revision application was preferred by the respondent Nos.1 and 2 in the Sessions Court. The impugned Judgment and Order has been passed on the Revision Application filed by the Respondent Nos.1 and 2.

3. The learned Counsel for the Petitioner submitted in view of the recent decisions of the Apex Court, the application made by the Applicant for recalling the order of process was not maintainable. He submitted that, in substance, the application made by the Respondents was for recalling process and not for discharge. He submitted that on plain reading of the complaint, a case for issuing process was clearly made out. He submitted that in a Revision Application filed for challenging the order passed on Application praying for recall of process, the learned Sessions Judge could not have quashed the order issuing process. He placed reliance on various

decisions, a reference to which will be made at later stage.

4. The learned Counsel for the Respondent Nos.1 and 2 submitted that the application made by the Respondent Nos.1 and 2 before the Trial Court was also for discharge and it was not a simplicitor application for recall of order issuing process. He submitted that under Section 245 (2) of the said Code, the learned Magistrate was empowered to discharge the Respondent Nos.1 and 2 even before recording of evidence. He submitted that on plain reading of the complaint, no case is made out and hence, no interference is called for with the impugned Judgment and order.

5. I have considered the rival submissions. In the application made by the Respondent Nos.1 and 2 at Exh.32 before the learned Magistrate, the following prayer was made:

"a. This Hon'ble Court may be pleased to recall the process against this accused and be pleased to discharge the accused from the aforesaid complaint by passing all, just, proper and necessary orders in the interest of justice."

6. On plain reading of the averments made in the application, it is obvious that essentially the application was praying for recalling the order of process and for consequential order of

discharge. If order dated 17th April 2002 is perused, it appears that the submissions were made on behalf of the Respondent Nos.1 and 2 before the learned Magistrate praying for recall of order issuing process. While rejecting the application on merits, the learned Magistrate observed that the case of the Respondent Nos.1 and 2 for discharge can be considered after evidence of the Applicant is recorded. Memorandum of Revision Application filed by the Respondent Nos.1 and 2 shows that the challenge was to the order dated 17th April 2002 by which the application at Exhibit 32 was rejected. There is no challenge in the said Revision Application to the original order issuing process. However, the learned Additional Sessions Judge has quashed the order issuing process as against the Respondent Nos.1 and 2.

7. It is not in dispute that Pending criminal case was a warrant triable case. In view of the law laid down by the Apex Court in the decision reported in A.I.R. 2004 S.C. 4674 (Adalat Prasad Vs. Rooplal Jindal and others), the application made by the Respondent Nos.1 and 2 for recalling the order issuing process was not maintainable. As held earlier, the application made by the Respondent Nos.1 and 2 at Exhibit 32 is essentially an application praying for recalling the order of process and for passing consequential order of discharge. In view of the law laid down by the Apex Court in case of Adalat Prasad (supra), the application at exh.32 made

by the Respondent Nos.1 and 2 was not maintainable and was rightly rejected by the learned Magistrate. The Revision Application filed by the Respondent Nos.1 and 2 was for challenging the order passed on Exhibit 32. As the application itself was not maintainable, the learned Additional Sessions Judge was not justified in interfering with the order passed on Application at Exhibit 32.

8. The learned Counsel for the Respondent Nos.1 and 2 submitted that in the Revision Application filed by the Respondent Nos.1 and 2, challenge was to the order passed below Exh.32 by which the prayer for discharge was rejected. He submitted that under Section 245 (2) of the said Code, the learned Magistrate has jurisdiction to discharge the Respondent Nos.1 and 2 and it was not necessary for the learned Magistrate to record any evidence. It is pertinent to note that the learned Additional Sessions Judge has quashed the order issuing process. There is no order passed by him for discharge in exercise of power under Section 245 (2) of the said Code. The learned Magistrate while rejecting the application filed by the Respondent Nos.1 and 2 has observed that after evidence is recorded, the case of the Respondent Nos.1 and 2 for discharge will be considered.

9. In my view, there was no occasion for the learned Additional Sessions Judge to consider the case for discharge

even under Section (2) of Section 245 of the Code as that was not the prayer made in the application at exh.32. Therefore, the order passed by the Additional Sessions Judge is unsustainable and deserves to be set aside.

10. Hence I pass the following order :

i) Impugned Judgment and order dated 3rd March 2004 is quashed and set aside and the Revision Application No.90 of 2002 filed by the Respondent Nos.1 and 2 is rejected.

ii) As observed by the learned Magistrate, it will be open for the Respondent Nos.1 and 2 to pray for order of discharge after evidence is recorded under Section 244 (1) of the said Code. It is made clear that this order will not prevent the Respondent Nos.1 and 2 from independently challenging the order of issuing process, if permissible in accordance with law.

iii) All contentions of the parties on merits of the pending complaint are expressly kept open.

iv) Parties to act upon an authenticated copy of this order.

JUDGE